

OCTOBER 7, 2009

Please provide copies of any and all documents submitted by the Carriers of Last Resort (“COLR”) to ORS in regard to the COLRs’ requests for distributions from the South Carolina Universal Service Fund for each of the years 2005 through the present. The requested documents include, but are not limited to, the *South Carolina Annual Universal Service Fund ILEC Data Report* and the *South Carolina State USF Per Line Support Calculation*.

On September 2, 2009, ORS served its objections and response to the Discovery Requests, and objected to producing any documents covered by Request 1-1 on the grounds that 1) the documents were confidential and protected from disclosure by Orders of the Commission and 2) that the documents were not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The Motion to Compel followed. ORS subsequently filed a Response to the Motion, and the CLECs filed a Reply to the Response.

There appears to be no dispute over whether the material is confidential, since the CLECs contacted ORS to notify it that the CLECs were willing to enter into a confidentiality agreement with regard to the production of the material. Further, this Commission had declared the material to be confidential in Commission Order Nos. 2005-139 and 2005-185 and the Universal Service Fund guidelines established by Commission Order No. 2001-996. The disagreement in the case is over whether or not the documents requested in Request 1-1 are within the proper scope of discovery.

II. ANALYSIS

Commission Regulation 103-833 (A) controls the scope of discovery. It provides that “[a]ny material relevant to the subject matter involved in the pending proceeding may be discovered unless the material is privileged or is hearing preparation working papers prepared for the pending proceeding.” 26 S.C. Code Ann. Regs. 103-833.A (Supp. 2008). The language is similar to the scope of discovery defined in Rule 26 of the Federal Rules of Civil Procedure and explained by the U.S. Supreme Court:

[t]he key phrase in this definition – ‘relevant to the subject matter in the pending action’ – has been construed broadly to encompass any matter that bears on, or that could reasonably lead to other matter that bear on, any issue that is or may be in the case...Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues..Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L. Ed. 2d 253 (1978) citing Hickman v. Taylor, 329 U.S. 495, 501 (1947). See also Hamm v. South Carolina Public Service Commission, 312 S.C. 238, 439 S.E. 2d 852 (1994), which holds, *inter alia*, that Rule 26 of the South Carolina Rules of Civil Procedure allows broad pre-trial discovery.

An examination of the requested material by this Hearing Officer reveals that the information sought in Request 1-1 is clearly within the proper scope of discovery. The issue before the Commission is whether lines that are sold by carriers of last resort (“COLRs”) as parts of bundles or contract offerings should be supported by the Universal Service Fund (“USF”). Under the Commission’s Guidelines, adopted in Order No. 2001-996, COLRs are required to submit certain information to the ORS in order to obtain USF funding. Part of the information required is each COLR’s number of “eligible lines.” See USF Administrative Procedures at p.3, approved in Order No. 2001-996. In the current proceeding, CLECs contend that lines that are parts of bundles or contract offerings are not eligible lines. CLECs state that it is critical to their ability to prepare for the hearing that they be able to see how the COLRs and ORS are currently reporting and accounting for COLRs’ eligible lines.

Although ORS counters by arguing that the sought documents are not relevant because ... “all lines (bundled or unbundled) that include basic local service are counted for purposes of state USF support” (ORS Response at 2), the CLECs explain that the forms in question required COLRs to submit certain information annually in order to obtain money from the USF. The calculation of High-Cost Support is explained by the Commission’s adopted Administrative Procedures:

COLRs will receive High Cost Support based upon the number of eligible residential and single-line business lines served by such COLR in a Designated Support Service Area. The amount of High Cost Support is determined by multiplying the number of eligible lines by the per line support available for such lines in the designated support service area.

Administrative Procedures, p. 3.

As explained in the Motion to Compel, the scope of discovery is broadly defined to “encompass any matter that bears on, or that could reasonably lead to other matters that bear on, any issue that is or may be in the case....” See Oppenheimer Fund, Inc. v. Sanders, supra. It is clear that these requested documents bear on the issues in this proceeding and are likely to lead to other matters of relevance. For example, the forms require COLRs to state the maximum amount that they can charge for their eligible lines. Since bundles and contract offerings are unregulated, the responses by the COLRs are likely to be relevant to issues in this proceeding.

Further, the Commission’s Administrative Procedures make it clear that since the USF began operations, COLRs have been required to report certain lines – those eligible for USF support – and exclude other lines – those ineligible for USF support. The parties are in apparent disagreement over whether bundles and contract offerings present lines

that are eligible for USF support. The Hearing Officer believes that it is reasonable for the CLECs to obtain the requested documents in discovery under the stated standard in order to examine how the COLRs have been reporting their eligible lines, especially when ORS has not stated that answering the discovery request would be burdensome, nor has ORS stated that providing the information would be harmful if the information is kept confidential. Further, no other party to this Docket has stated a position on this matter.

III. CONDITIONS AND ORDER OF PROTECTION

Having determined that the requested material is discoverable, but with the CLECs and ORS agreeing with the Commission's prior Orders that the material is of a confidential nature, it remains to establish certain conditions for the protection of the confidential material to be turned over to the CLECs. Accordingly, the undersigned Hearing Officer adopts the following provisions to facilitate the prompt review of the ORS material by the CLECs, while adequately protecting the confidential nature of the material at issue:

1. The term "Confidential Information," for the purposes of this Order, refers to information provided in any and all documents submitted by the Carriers of Last Resort to ORS in regard to the COLRs' requests for distributions from the South Carolina Universal Service Fund for each of the years 2005 through the present, said documents including, but not limited to, the *South Carolina Annual Universal Service Fund ILEC Data Report* and the *South Carolina State USF Per Line Support Calculation*.
2. The term "this Proceeding," for purposes of this Protective Order, shall include only the Docket in which this Order is entered and any appeals thereof.

3. **General.** The CLECs (SCCTA, CompSouth, NuVox, and tw) and ORS will be bound by the terms of this Protective Order upon its entry and may thereafter exchange Confidential Information. Either the CLECs or ORS shall be entitled to seek enforcement of (or other appropriate relief, including sanctions pertaining to) this Protective Order before the Commission, or any other authority having competent jurisdiction, for any breach or threatened breach of this Protective Order. This Protective Order shall control the production and disclosure of all materials deemed "Confidential Information." This provision does not limit the ability of any other party to seek enforcement of any other existing Commission Order with regard to the Confidential Information.

4. **Designation of Material.** Confidential Information provided by ORS to the CLECs in this Proceeding must be presented in a sealed envelope with each page marked "Confidential" in red ink, or with other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature.

5. **Permissible Disclosure of Confidential Information.** Confidential Information provided pursuant to this Protective Order may be disclosed without prior consent to the following persons or entities, but only under the following conditions, and only to the extent necessary to assist in prosecuting this Proceeding:

- a. Counsel of record representing the CLECs in this Proceeding and any legal support personnel (e.g. paralegals, docket managers, and clerical employees) employed by such counsel and acting at the direction of

counsel; court reporters, stenographers, or persons operating audio or video equipment at hearings or depositions.

b. Other employees, officers, directors of the CLECs or its affiliates, or consultants or experts retained by the CLECs, who are not currently involved in the marketing, manufacturing or strategic or competitive decision making, including but not limited to, the sale or marketing or pricing of any products or services on behalf of the receiving party, unless the producing party gives prior written authorization for specific individuals in the prohibited categories above, to review the Confidential Information. If the producing party refuses to give such written authorization, the receiving party may for good cause shown, request an order from the Hearing Officer or the Commission, allowing an individual in the prohibited category above to have access to the Confidential Information. Individuals who become reviewing representatives under this paragraph agree that they will not use the Confidential Information made available pursuant to this Protective Order to plan, develop, or market any computerized telecommunications costing models. Nor will individuals who become reviewing representatives under this Agreement use the Confidential Information to engage or consult in the marketing, manufacturing, or provision of any products or services on behalf of the receiving party or its affiliates.

c. Individuals obtaining access to Confidential Information under this Protective Order shall not disclose Confidential Information made available pursuant to this Order to any person who is not authorized under this section to receive such information.

d. Each individual who is provided access to Confidential Information made available pursuant to this Protective Order must first sign, and have notarized, a statement affirmatively stating that the individual has reviewed this Protective Order and understands and agrees to be bound by the limitations it imposes on the individual. Attachment A to this Protective Order is the notarized statement to be used.

e. Each individual reviewing Confidential Information made available pursuant to this Protective Order may take notes regarding the information. The notes and any subsequent work product based on the notes may not be replicated or copied, except as necessary for distribution to other representatives who have signed and notarized the statement attached as Attachment A hereto, or except in connection with offering such notes or work product into evidence or otherwise into the record pursuant to paragraph seven below. The reviewing individuals shall take reasonable measures to identify and track all such notes, copies, and work product so these materials can be identified and destroyed or returned in compliance with Paragraph f below.

f. At the conclusion of the Docket in which this Order is entered, including all appeals, all such work product and any other Confidential Information obtained hereunder, including any copies or notes, (other than any copies submitted to and included in the official Commission record) shall be assembled from the persons having same and destroyed or returned to the producing party, and counsel shall notify the producing party in writing that this destruction or return has been completed.

7. Each party bound by this Protective Order agrees that if it attempts to submit Confidential Information into evidence or into the record of any proceeding before any court or agency, it will work cooperatively with counsel for the producing party to do so in a manner that, to the fullest extent possible, protects such Confidential Information from public disclosure.


8. **Subpoena by Courts or Other Agencies and Other Requests.** If a court or other administrative agency subpoenas or orders production of Confidential Information that a party has obtained under the terms of this Protective Order, or if a party receives any other request to produce Confidential Information and believes that it is obligated to comply with such request, the party requested to produce the Confidential Information shall promptly (within two (2) business days) notify the producing party of the pendency of such subpoena or order to allow the producing party sufficient time to object to that production or seek a protective order.

9. **Non-termination.** The provisions of this Protective Order shall not terminate at the conclusion of this proceeding.

10. **Responsibilities of the Parties.** The parties, i.e. the CLECs and ORS, are responsible for employing reasonable measures to control, consistent with this Protective Order, duplication of, access to, and distribution of Confidential Information. A receiving party shall protect such Confidential Information by using the same degree of care (which shall be no less than reasonable care) to prevent its unauthorized disclosure as the receiving party exercises in the protection of its own confidential information.

IV. CONCLUSION

The Motion to Compel is granted and the Protective Order as stated above is hereby imposed. ORS shall furnish the delineated information to the CLECs within five (5) days of receipt of this Order, while at the same time, complying with the other provisions of this Order. This Order shall remain in full force and effect until further Order of this Hearing Officer or of the Commission.


F. David Butler, Hearing Officer

ATTACHMENT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

CERTIFICATE OF AUTHORIZED REVIEWING REPRESENTATIVE

BEFORE ME, the undersigned authority, duly Commissioned and qualified in and for the State and County aforesaid, personally came and appeared _____ (insert name), who, being by me first duly sworn, deposed and said as follows:

I certify my understanding that Confidential Protected Materials are provided to me pursuant to the terms and restrictions of the Protective Order adopted by the South Carolina Public Service Commission Hearing Officer in Docket No. 2009-326-C, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of "Confidential Information," and any notes, memoranda, or any other form of information regarding or derived from Confidential Information shall not be disclosed to anyone other than in accordance with the Protective Order and shall be used only for the purpose of preparing for and conducting litigation in this Proceeding.

Signature: _____

Date of Execution: _____

Name: _____
(Type or print)

Title: _____

Company: _____

Address: _____

SWORN TO AND SUBSCRIBED BEFORE ME
this _____ day of _____ 2009.

My Commission expires: _____

(NOTARY PUBLIC) (Seal)